



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

Site: New Bedford
Issue: 5.3
Order: 58456

September 12, 1988

Paul B. Galvani
Ropes & Gray
225 Franklin Street
Boston, MA 02110

Dear Mr. Galvani:

This is in response to your letter of August 18, 1988. Your letter overlooks the fact that it is the comments on the DART submitted by you and your co-defendants, and not any invention by EPA, which "raise the issue of the Brown report". As set forth in my previous letter, which was mailed on August 17, the DART comments cite and rely on "Brown and Wagner, 1987", and not on your requests for admission ("RFAs"), the accompanying chromatograms, or any document from General Electric concerning New Bedford.

Moreover, as I stated in a letter to you dated May 26, 1987, EPA has considered your RFA material, such as it is, in the RI/FS process. Unfortunately, the RFA material is fragmentary, incomplete and insufficient for ordinary scientific review. The only document EPA has received discussing the relevance of your studies to EPA's choice of remedies is the DART comments, and that document advances only conclusory statements concerning New Bedford Harbor, each one supported by the "Brown and Wagner, 1987" reference, as if that were a reference to a published, peer reviewed work. As your letter of August 18 states, "Brown and Wagner, 1987" is actually a document which is being withheld by you as work product. The document has never been published, has never been peer reviewed, and has never been made available for review by EPA. It is evident that statements of conclusions based on an undisclosed report cannot be reviewed and relied upon by EPA in its remedial decision.

The RFAs, like the DART comments, are also based in many places on undisclosed documents. EPA and DOJ have attempted, largely without success, to obtain from you the additional documents cited but not produced. Our efforts are worth reviewing in detail. Some of these materials (from the July, 1986 RFAs) were specified in Motion US-11, Plaintiffs' Motion to Compel, filed January 21, 1987. Additional documents from the January, 1987 RFAs, were specified in Bill Brighton's letter to you dated

June 2, 1987.¹ My records indicate that you never responded to the June 2 letter.

As I detailed in my August 17 letter, EC Jordan requested information from GE in February, 1987, and GE directed them to you. I wrote to you on May 26, 1987, indicating that EPA would be willing to consider Dr. Brown's research if you were to submit it to us. Although you replied on July 16, 1987, you never indicated that any specific information would be submitted to EPA. I responded on August 3, 1987, again urging that Aerovox submit to EPA any information on biodegradation which you wish EPA to consider. You never responded.

On December 7, 1987, Ellen Mahan wrote to you noting that in your opposition to US-11, filed on January 30, 1987, you had informed the court that chromatograms of the analyses performed by Dr. Brown in January, 1987, would be provided to the plaintiffs. You never responded to the December 7, 1987 letter. Now, in your August 18, 1988 letter, you make the peculiar assertion that the government "will have the relevant chromatograms".

Split sampling with Dr. Brown was originally discussed with you, and orally agreed to by you early in 1987, shortly after the filing of US-11. On June 23, 1987, I sent you a letter asking that the split samples be sent to a mailing address at Narragansett Laboratory. You never responded. Ellen Mahan's letter of December 7, 1987, pointed out that you had not responded to the June 23 letter. You never responded. On January 21, 1988, Ellen Mahan wrote to you again, enclosing a letter which Dr. Brown had sent on November 23, 1987 to Dr. James Lake of EPA-Narragansett, proposing split sampling. Ms. Mahan's letter indicated that we were prepared to go forward with Dr. Brown's proposal. You never responded.

Subsequently, in a letter dated April 27, 1988, you and your co-defendants proposed that EPA split samples for you during our

¹ An additional example of a document which was withheld from the RFAs, which we would like to review, is from Attachment XIX-6, which states on its first page that it includes, inter alia, the following:

"4. Computer printout for the latter 24 GC's and those of the Aroclor standards giving peak assignments, weight percents, and mole percents for all PCB peaks."

Not included in the Attachment is a computer printout, as described above, for the Aroclor 1016 standard, for which a chromatogram is included on page "A-2". We request this document as well.

Pilot Study. In our May 9 response, we agreed to split samples on a limited basis, but asked that you reciprocate with samples from Dr. Brown. We subsequently received a letter dated June 22, 1988 on Morgan, Lewis stationary, signed for you by Howard Weir, reporting that you had agreed to provide us with samples from Dr. Brown. I replied on July 15, asking that you ship the samples promptly to the address of EPA's Narragansett Laboratory. Although you now assert that EPA "will be getting the samples", to date we have received nothing.

Because of our schedule and budget constraints, if we do not receive the samples before the end of September, we cannot guarantee that we will be able to analyze them or make use of the results. We therefore re-iterate our request that these samples, for which we have been waiting for a year and a half, be shipped promptly.

Finally, your letter concludes with the assertion that "Dr. Brown will be made available for further interview by the EPA". Although Dr. Brown has on occasion lectured to EPA audiences on behalf of GE, nothing in the nature of an "interview" with Dr. Brown has ever occurred, nor is any such thing planned for the future. More importantly, Dr. Brown has lectured concerning GE sites, and, although he has made some tangential comments concerning his work in New Bedford, he has on the whole adhered to the position that any discussion of his work in New Bedford must come through you, as he stated in his April 16, 1987 letter to E.C. Jordan, which I have sent to you on two previous occasions.

EPA and DOJ have made extensive efforts to evaluate the bases of your claims concerning biodegradation. EPA and its contractors have considered and continue to consider all the information available to us. In light of the history above, your charge that EPA is seeking an "excuse for avoiding the substantive issues" is wholly without merit. The government must base its decision on a publicly available record, and the record must contain documented verifiable facts which support the decision. None of this is changed by your assertion, whether merited or not, of the work product privilege in resisting disclosure of "the Brown report". Whether or not you choose to produce that particular document, you cannot expect us to accept your claims unless you produce evidence to support them.

In closing, let me repeat that it is you, as the authors of your DART comments, who chose to rely on the Brown report. It is your efforts to have us consider your comments, and, presumably, adopt your conclusions, that compel us to ask for the necessary

documentation. Without supporting documentation, there is nothing for us to review and no basis to support a decision.

Yours Sincerely,

A handwritten signature in cursive script, appearing to read "Charles C. Bering".

Charles Bering
Assistant Regional Counsel

cc: Ellen Mahan
Frank Ciavattieri
Nancy Preis
[All defense counsel]